U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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FILE: EAC 04 029 52057 Office: VERMONT SERVICE CENTER Date: JUL 26 2005

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Marie Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a skin care products distributor and spa operator. It seeks to employ the beneficiary permanently in the United States as a manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly. The director also determined that the position, as described on the labor certification, does not qualify for the immigrant classification sought.

On appeal, the petitioner submits letters from counsel and from the petitioner's accountant.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 15, 2000. The proffered wage as stated on the Form ETA 750 is $62,000 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner from January 2000 onward.

On the petition, the petitioner claimed to have been established in January 2001, to have a gross annual income of $490,000, and to currently employ 12 workers. The petitioner left blank the line marked "Net Annual Income." In support of the petition, the petitioner submitted documentation regarding the beneficiary's qualifications, but no financial documents of any kind.

On July 12, 2004, the director requested copies of the petitioner's federal income tax returns, or annual reports and financial statements, from 2000 through 2003. The director also requested copies of Form W-2 Wage and Tax Statements that the petitioner issued to the beneficiary during those years.

In response, the petitioner has submitted copies of the petitioner's 2001-2003 tax returns and the beneficiary's Forms W-2 from 2000 through 2003.

The Forms W-2 show that [redacted] paid the beneficiary as follows:

2000	$36,900	2001	$44,727.40	2002	$51,934.09	2003	$51,044.00

[redacted] of the accounting fi[redacted] states that Dr. Katchen is the petitioner's sole shareholder, and that the petitioner "is charged back for this allocated salary." The record contains no documentation to prove that these reimbursements have, in fact, taken place. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner must show that the employer (rather than an officer of the company) is able to pay the full proffered wage. The unusual payment arrangement raises the question of why Dr. Katchen pays the beneficiary's salary out of his own pocket, unless the company itself is unable consistently to do so.

Counsel states that the forms "show . . . a regular increase in wages over the past three years from $37,000 to $52,000 per annum. It is clear from this progression that Petitioner can and will pay the offered salary of $62,500" (sic; the labor certification states the wage as $62,000 even). The forms do not show a "regular increase in wages." Rather, the beneficiary's wages declined by nearly a thousand dollars from 2002 to 2003. The forms show only that, even after four years of employment, the beneficiary has never received the full wage offered in 2000. The fact that the beneficiary has never received the proffered wage, and his salary actually dropped in 2003, does not in any way point toward the conclusion "that Petitioner can and will pay the offered salary of $62,500."

Counsel states that the petitioner's 2000 tax return is included in the submission, but that document is not in the record. The other three tax returns show the following information:

	2001	2002	2003
Total income	$266,784	$347,904	$359,613
Salaries and wages	176,081	186,939	186,913
Ordinary income (loss)	(252,923)	(148,823)	(157,389)
Cash at end of year	1,027	5,586	613
Other current assets	26,603	19,935	20,631
Current liabilities	213,328	121,189	130,888
Loans from shareholders	242,622	596,773	772,776

The above figures indicate that the company is losing substantial amounts of money, and remains solvent only because Dr. Katchen loans the company nearly a quarter of a million dollars every year. The steady infusion of loans from the company's sole shareholder suggests that Dr. Katchen pays the beneficiary out of his own pocket because the petitioning company cannot do so directly; the company, like its employees, relies on the owner's personal largesse.

The director denied the petition, noting that the petitioner has reported substantial losses every year, while never paying the beneficiary's full wage. On appeal, counsel states:

> We believe the decision to be based on an inaccurate interpretation of the facts, and a misreading of the submitted tax returns. You cannot simply look at a bottom line, and conclude that because a loss was reported, the business cannot meet its expenses or pay proffered salaries. The nature of the business along with its location must also be considered, as must the company's documented history of meeting all its past and present expenses. It is common knowledge in the beauty industry that it can take years to make such a business independent. . . .
>
> [I]t can take anywhere from 4 to 7 years to get a beauty business going on its own. In the meantime . . . any difference between revenues and expenses has been and will continue to be met by Dr. Katchen.

Accountant Paula Vogel states that the petitioner "is a young company that is growing stronger each year," and "[t]his type of entity takes time to build its clientele." Here, the director did not "simply look at a bottom line." Beyond the figures on the tax returns, the record contains several indications that the petitioner *cannot* pay the full proffered wage – for instance, the petitioner does not directly pay its workers, and the beneficiary has never received the full amount offered.

As for the nature of the petitioner's business, 8 C.F.R. § 204.5(g)(2) plainly requires that the petitioner must be able to pay the full proffered wage from the filing date onward. It cannot suffice simply to argue that the business needs time to grow. The petitioner chose to begin these proceedings in March 2000, only eight months after the July 9, 1999 incorporation date reflected on the petitioner's tax returns.[1] If the petition had been adjudicated on the day it was filed, the petitioner would certainly have been in no position to ask that the director wait several years to allow the company to mature. The petition must be approvable as of the filing date; subsequent developments cannot cause the petition to become approvable at a later date. *See Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998), and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971). The argument that the petitioner will eventually become profitable is an argument for filing a new petition *after* that has come to pass, rather than an argument for approving the petition as it stands now, with the understanding that the petitioner *may* eventually become self-sufficient.

Ms. Vogel, and counsel, point to steady increases in the petitioner's gross sales. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Counsel acknowledges that the petitioner has been heavily dependent on major cash infusions from Dr. Katchen. The petitioner has been losing money in six-figure amounts every year, and there is no indication that the petitioner will be able to pay back these loans anytime soon. Because the petitioner is a corporation, and therefore a separate legal entity from Dr. Katchen, we cannot regard Dr. Katchen's financial situation as evidence of the petitioner's financial solvency. The record contains no first-hand evidence that the petitioner has, in fact, reimbursed Dr. Katchen for the salary paid to the beneficiary since 2000.

We note that, in the request for evidence dated July 12, 2004, the director specifically instructed the petitioner to submit the petitioner's 2000 income tax return. The 2000 return is material because it concerns the petitioner's finances during the year of the priority date. The petitioner has not submitted this document. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Based on the above discussion, we conclude that the petitioner is not, and has not been, able to pay the beneficiary's proffered wage since March 2000, and that the beneficiary has received only a partial salary, even then from a source other than the petitioning corporation. The record offers no indication that the petitioner ever has been, or is soon to be, able to support itself without massive support from Dr. Katchen, who is under no legal obligation to provide such support. The argument, on appeal, that the petitioner

[1] The Form I-140 indicates that the petitioning company was "established" in January 2001, ten months *after* the March 2000 priority date. If true, the petition would be invalid because the petitioner would not have legally existed in March 2000. State records confirm that the petitioner was incorporated in July 1999, and not in January 2001.

requires several years to reach maturity, serves only to support our finding that, at the age of eight months, the petitioning corporation was not yet in a position reliably to pay the beneficiary's full wage. We affirm the director's decision.

The remaining issue concerns the immigrant classification that the petitioner has sought on the beneficiary's behalf. On the Form I-140 petition, the petitioner indicated that it seeks to classify the beneficiary as an alien of exceptional ability or as a member of the professions holding an advanced degree. The petitioner did not clearly specify which of the two classifications it sought, but counsel, in a cover letter accompanying the petition, states: "Beneficiary's role in Petitioner is managerial and executive in nature, and he holds advanced degrees in law and art history . . . he is thus entitled to second preference classification." The reference to the beneficiary's "managerial and executive" duties is not germane to the classification sought, because the statute and regulations governing the two classifications do not mention managerial or executive duties. There exists a separate classification for managers and executives of multinational corporations, but the petitioner did not seek that classification, nor has the petitioner claimed to be a multinational corporation.

Given counsel's reference to "advanced degrees," it appears that the petitioner seeks to classify the beneficiary as a member of the professions holding an advanced degree.

8 C.F.R. § 204.5(k)(4)(i) states that the job offer portion of the individual labor certification must demonstrate that the job requires a professional holding an advanced degree (or the defined equivalent). 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

In this instance, the labor certification indicates that the position requires a bachelor's degree and two years of experience in a related occupation. Thus, the position does not require an advanced degree or the equivalent (i.e., five years of progressive post-baccalaureate experience). We note that the beneficiary holds advanced degrees, but this is irrelevant to the question of whether the position *requires* an advanced degree.

The director, in denying the petition, stated that the "labor certification . . . does not support" classification under section 203(b)(2) of the Act. On appeal, counsel states "we request that Beneficiary be classified . . . under INA 203(b)(3)(A)(i)." We concur with the director that the position, as described on the labor certification, does not require an advanced degree. The petitioner, on appeal, has not contested this finding. With regard to counsel's request for reclassification, the statute and regulations contain no provision for changing the classification sought after the petition has already been denied. While nothing prevents the director, before issuing a decision, from inviting the petitioner to change the classification sought, the director is not *required* to do so, and the director's failure to do so is not grounds for reversal of the decision. The labor certification remains valid and could form the basis of a new petition, with the same priority date, seeking a more appropriate classification; but any new petition would still involve the same issues involving the petitioner's ability to pay the beneficiary's proffered wage from the filing date onward.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.